

¹ 5 U.S.C. §§ 8101-8193.

clarifying opinion from the physician regarding his conclusions because he did not reference the A.M.A., *Guides* and did not provide a sufficient explanation for his conclusions. The attorney further asserted that OWCP erred in basing the overpayment determination on the referee physician's opinion.

FACTUAL HISTORY

On July 26, 2001 appellant, then a 49-year-old clerk, sustained a herniated lumbar disc when she fell down steps at work. The claim was adjudicated by OWCP under file number xxxxxx108. On December 5, 2002 appellant suffered a second traumatic injury, accepted for cervical and lumbar sprains with cervical and lumbar radiculitis and herniated discs at C3-4 and C4-5. The 2002 claim was adjudicated under file number xxxxxx179, and the files were combined in March 2005. On December 11, 2006 OWCP accepted that she sustained a recurrence of disability on July 11, 2004. On June 16, 2008 it accepted adjustment disorder with depression. In an April 9, 2009 decision regarding both claims, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 12, 2009. The termination was affirmed by an OWCP hearing representative on October 15, 2009.

On March 11, 2010 appellant filed a schedule award claim and submitted a December 1, 2009 report in which Dr. David Weiss, an osteopath, advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),² appellant had a right upper extremity impairment of 1 percent, a left upper extremity impairment of 18 percent, a right lower extremity impairment of 11 percent, and a left lower extremity impairment of 9 percent. In a March 23, 2010 report, Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP medical adviser, indicated that appellant had a four percent impairment of each lower extremity. On April 23, 2010 he advised that appellant had a three percent impairment of the right upper extremity.

On June 28, 2010 appellant was granted a schedule award for a four percent impairment of the right lower extremity and a four percent impairment on the left. On October 20, 2010 she was granted a schedule award for a three percent impairment of the right upper extremity.

In a January 6, 2011 decision, an OWCP hearing representative found that a conflict in medical evidence had been created between the opinions of Dr. Weiss and OWCP's medical adviser, and remanded the case to OWCP for an impairment evaluation regarding appellant's impairments. In February 2011 OWCP referred appellant to Dr. Scott A. Rushton, a Board-certified orthopedic surgeon, who was specifically asked to utilize the sixth edition of the A.M.A., *Guides* and state whether appellant had a ratable permanent impairment of the upper and/or lower extremities causally related to the July 26, 2001 and December 5, 2002 employment injuries.

In a March 17, 2011 report, Dr. Rushton noted his review of the statement of accepted facts and medical record and history of both employment injuries. He described appellant's current complaint of low back, neck, right lower extremity and bilateral arm, hand and finger pain. Dr. Rushton indicated that appellant no longer received treatment for medical conditions.

² A.M.A., *Guides* (6th ed. 2008).

He noted that, at the time of his physical examination, appellant was wearing a walking boot on her left foot due to a recent ankle fracture, and he was unable to do motor strength or range of motion testing of the left lower extremity. Physical examination of the cervical and lumbar spine demonstrated no tenderness. Upper extremity examination demonstrated 2+ reflexes at the biceps, triceps, and brachioradialis bilaterally and no evidence of a Spurling's maneuver bilaterally with negative Tinel's test negative at the cubital tunnel, carpal tunnel and Guyon's canal. Right lower extremity examination demonstrated 5/5 strength testing in all groups. There was no evidence of nerve root tension in the seated position at 30 and 90 degrees leg elevation both actively and passively bilaterally. Examination of the left lower extremity was limited because of the walking boot. Dr. Rushton indicated that appellant had no evidence of impairment in the upper or lower extremities due to either the 2001 or the 2005 employment injury, based on his review of the medical record and imaging studies, which supported age-dependent degenerative disease in the cervical and lumbar spine. He advised that he found no evidence to support an aggravation or aggravating event to lead to the progression of the degenerative disc disease, other than expected with age and degeneration.

In a May 31, 2011 report, Dr. Christopher R. Brigham, Board-certified in family and occupational medicine and an OWCP medical adviser, advised that he agreed with Dr. Rushton's method of evaluation and application of the A.M.A., *Guides*. OWCP's medical adviser reported that appellant was injured on July 26, 2001, and that the accepted injuries were lumbar sprain and lumbar disc herniation. He indicated that maximum medical improvement was reached on July 11, 2005, one year after the last recurrence. Regarding appellant's impairment rating, Dr. Brigham advised that Dr. Rushton's conclusion that appellant had a zero percent impairment of the lower extremities was correct because there were no sensory or motor deficits in the lower extremities that would result in a ratable impairment. Dr. Brigham did not specifically discuss Dr. Rushton's findings and conclusions regarding the upper extremities.

By decision dated June 7, 2011 OWCP found that appellant had not established that she was entitled to a schedule award, based on the opinion of Dr. Rushton, as reviewed by Dr. Brigham. On December 19, 2011 an OWCP hearing representative affirmed the June 7, 2011 decision.

In a February 22, 2012 decision, OWCP found that an overpayment of compensation in the amount of \$15,943.48 had been created because appellant was erroneously paid schedule awards. Appellant was found without fault and was not granted waiver because her household income exceeded her allowable expenses. Repayment was set at \$500.00 each month.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,³ and its implementing federal regulations,⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶ For decisions issued after May 1, 2009, the sixth edition will be used.⁷

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).⁸ Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹¹

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.¹² In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹³

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.¹⁴ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ A.M.A., *Guides*, *supra* note 2 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

⁹ *Id.* at 494-531.

¹⁰ *Id.* at 521.

¹¹ *Id.* at 23-28.

¹² *Pamela J. Darling*, 49 ECAB 286 (1998).

¹³ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁴ *Rozella L. Skinner*, 37 ECAB 398 (1986).

section 3.700 of its procedures which memorializes proposed tables outlined in *The Guides Newsletter*, July-August 2009.¹⁵

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁶ The implementing regulation state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁷ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁸

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision because a conflict remains regarding the degree of appellant's permanent impairment.

Appellant's argument on appeal that the physician who provided the impartial evaluation for OWCP was improperly selected under the Physicians Directory System (PDS) is without merit.¹⁹ The record in this case includes a February 15, 2011 MEO23 iFECS report which states that the employee's referee appointment was scheduled with Dr. Rushton. The record also contains a report of telephone call made to schedule the appointment with Dr. Rushton and one screen shot that indicates that Dr. Herbert Stein was bypassed because the case file was too big. Thus, the selection in this case was supported by the ME023 report identifying Dr. Rushton, and contains a screen shot documenting the reason Dr. Stein was bypassed. In the case *K.S.*, the Board noted that such documentation was sufficient to establish that OWCP met its obligation to

¹⁵ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 7.

¹⁶ 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

¹⁷ 20 C.F.R. § 10.321.

¹⁸ *V.G.*, 59 ECAB 635 (2008).

¹⁹ At the time that Dr. Rushton was selected, OWCP procedures provided that the selection of impartial medical specialists was made through a strict rotational system using appropriate medical directories. The procedures state that the PDS should be used for this purpose whenever possible. The PDS was a set of stand-alone software programs designed to support the scheduling of second opinion and impartial medical examinations. The PDS database of physicians was obtained from the American Board of Medical Specialties whose records contained the names of physicians who are Board-certified in certain specialties. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b and 3.500.7 (May 2003). OWCP subsequently implemented its iFECS-based Medical Management Application (MMA) system. *Id.* at Chapter 3.500.5 (July 2011). This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.

properly select an impartial referee physician.²⁰ The Board finds that Dr. Rushton was properly selected as a referee physician in this case.

Nonetheless, the Board finds this case is not in posture for decision. Dr. Rushton was unable to examine appellant's left lower extremity due to the ankle fracture. Therefore, he could not thoroughly evaluate appellant's left lower extremity to determine if she had a ratable impairment. As such, Dr. Rushton's report is incomplete. Moreover, the referee physician did not indicate that he performed complete sensory testing, such as pinprick, on the upper or lower extremities and did not mention application of the A.M.A., *Guides* in his report. OWCP's medical adviser, Dr. Brigham, only discussed one employment injury, the 2001 injury when appellant sustained an employment-related herniated lumbar disc. Dr. Brigham did not discuss the 2002 injury, accepted for cervical and lumbar sprain with radiculitis. He stated that he agreed with Dr. Rushton's method of evaluation and application of the A.M.A., *Guides*, whereas, as noted above, Dr. Rushton did not mention the A.M.A., *Guides* in his report. Furthermore, Dr. Brigham stated that there were no sensory or motor deficits in the lower extremities that would result in a ratable impairment. Dr. Rushton did not discuss sensory findings. Dr. Brigham merely concluded that Dr. Rushton's finding that appellant had a zero percent lower extremity impairment was correct.²¹

When OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. It did not do so in this case. On remand, OWCP should request Dr. Rushton to provide a rating for the upper and lower extremities, in accordance with the A.M.A., *Guides*. If Dr. Rushton is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.²² Accordingly, the Board will remand the case to OWCP. Following this and any other development deemed necessary, OWCP shall issue an appropriate decision.

In view of the Board's disposition of the schedule award issue, it is premature to address the issue of whether appellant received an overpayment of compensation.

CONCLUSION

The Board finds this case is not in posture for decision.

²⁰ Docket No. 12-184 (issued September 11, 2012).

²¹ Section 10.502 of OWCP regulations and OWCP procedures provide that when OWCP directs an employee to undergo a referee examination to resolve a conflict, it is to rely on the opinion of the medical referee in determining the issue. 20 C.F.R. § 10.502; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(g) (April 1993). To properly resolve the conflict of medical opinion in this case, it is the impartial medical specialist who should provide a reasoned opinion as to the extent of permanent impairment. An OWCP medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial specialist. *V.G.*, 59 ECAB 635 (2008).

²² See *Phillip H. Conte*, 56 ECAB 213 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2012 and December 19, 2011 decisions of Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: July 5, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board